Michael Chong Shui Keong @ Michael Chong v Fong Shui En

HIGH COURT (KOTA KINABALU) — CIVIL APPEAL NO 11-01 OF 1996
TEE AH SING JC
15 APRIL 1996

Civil Procedure *— Appeal — Appeal to High Court — When memorandum of appeal to be filed and served — Whether memorandum of appeal filed and served out of time*

Civil Procedure *— Time — Extension of time — No application and supporting affidavit filed for extension of time — Whether application and supporting affidavit for extension of time required*

On 7 July 1995 the magistrate ordered that the appellant pay maintenance of RM3,000 per month to the respondent. The appellant filed a notice of appeal on 12 July 1995, which notice was subsequently served on the respondent's solicitors on 25 July 1995. The notice from the magistrates' court registry informing the appellant's solicitors that the notes of evidence and the grounds of judgment were ready ('Form 141') was served on the appellant on 14 December 1995. At the hearing of the appeal, counsel for the respondent raised the following preliminary objections, submitting that (i) the notice of appeal was served on the respondent outside the time prescribed under O 49 r 2(6) of the Subordinate Courts Rules 1980 ('the SCR'); (ii) there was a delay in the filing and the service of the memorandum of appeal in contravention of O 55 r 2(1) and (2) of the Rules of the High Court 1980 (the RHC'); and (iii) the record of appeal was filed outside the time prescribed under O 49 r 3A(3) and (4) of the SCR. The issues to be decided by the court were: (i) when should the memorandum of appeal be filed and served; (ii) whether the delay in serving the notice of appeal and the memorandum of appeal was a mere irregularity curable under O 2 of the RHC and O 2 of the SCR and as such, whether the court was empowered under O 3 r 5 of the RHC to extend or abridge the period within which a person is required by the rules to do any act in any proceeding.

Held, dismissing the appeal:

(1) Order 55 r 2(1) and (2) of the RHC require an appellant to file and serve a memorandum of appeal within 14 days from the date of service on the appellant of Form 141 under O 49 rr 2(4) or 3(2) of the SCR. Order 55 r 4(3) of the RHC provides that if the memorandum of appeal is not filed or served within the prescribed time and no sufficient ground is shown for the delay, the appeal may be dismissed (see p 181B–D); *Siang Galau v Ang Wak Hiong* [1994] 1 MLJ 42 followed.

(2) No application had been made for an extension of time supported by an affidavit giving reasons why the notice of appeal was served

out of time and why the memorandum of appeal was filed and served out of time. What the appellant's counsel should have done was to apply to the High Court for an extension of time by an application supported by an affidavit (see p 183D–E); *Mohd Afsar Yunus v Handal Utama Sdn Bhd* [1995] 2 CLJ 118 and *Siang Galau v Ang Wok Hiong* [1994] 1 MLJ 42 followed.

[Bahasa Malaysia summary

Pada 7 Julai 1995 majistret telah memerintahkan supaya perayu membayar nafkah sebanyak RM3,000 sebulan kepada responden. Perayu telah memfailkan notis rayuan pada 12 Julai 1995, notis yang mana telah kemudiannya disampaikan ke atas peguamcara responden pada 25 Julai 1995. Notis daripada pejabat pendaftaran mahkamah majistret yang memaklumkan peguamcara responden bahwa nota-nota keterangan dan alasan-alasan penghakiman telah sedia ('Borang 141') telah disampaikan ke atas perayu pada 14 Disember 1995. Di pembicaraan rayuan ini, peguam bagi pihak responden telah menimbulkan bantahan-bantahan awal yang berikut, dengan berhujah bahawa: (i) notis rayuan telah diserahkan ke atas responden di luar jangkamasa yang ditetapkan di bawah A 49 k 2(6) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'); (ii) terdapat kelewatan di dalam pemfailan dan penyampaian memorandum rayuan yang melanggar A 55 k 2(1) dan (2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'); dan (iii) rekod rayuan telah difailkan di luar jangkamasa yang ditetapkan di bawah A 49 k 3A(3) dan (4) KMR. Isu-isu yang perlu diputuskan oleh mahkamah adalah: (i) bilakah memorandum rayuan harus difailkan dan disampaikan; (ii) sama ada kelewatan di dalam memfailkan notis rayuan dan memorandum rayuan cuma suatu kesilapan luar aturan yang boleh dibetulkan di bawah A 2 KMT dan A 2 KMR dan oleh itu, sama ada mahkamah diberikuasa di bawah A 3 k 5 KMT untuk melanjutkan atau mengurangkan tempoh masa dalam mana seseorang diperlukan di bawah mana-mana kaedah untuk membuat apa-apa tindakan di dalam mana-mana prosiding.

Diputuskan, menolak rayuan:

(1) Aturan 55 k 2(1) dan (2) KMT memerlukan sesorang perayu untuk memfailkan dan menyampaikan memorandum rayuan dalam tempoh 14 hari dari tarikh penyampaian ke atas perayu akan notis Borang 141 di bawah A 49 kk 2(4) atau 3(2) KMR. Atutan 55 k 4(3) KMT memperuntukkan bahawa jika memorandum rayuan tidak difailkan atau disampaikan dalam jangkamasa yang ditetapkan dan tiada alasan yang memadai ditunjukkan untuk kelewatan itu, rayuan itu boleh ditolak (lihat ms 181B–D); *Siang Galau v Ang Wak Hiong* [1994] 1 MLJ 42 diikut.

(2) Tiada permohonan telah dibuat untuk melanjutkan masa yang disokong oleh afidavit yang menyatakan sebab-sebab mengapa

notis rayuan telah disampaikan di luar jangkamasa dan mengapa memorandum rayuan telah difailkan dan disampaikan di luar jangkamasa. Apa yang peguam perayu seharusnya membuat adalah untuk memohon kepada Mahkamah Tinggi untuk perlanjutan masa melaui suatu permohonan yang disokong oleh afidavit (lihat ms 183D–E); *Mohd Afsar Yunus v Handal Utama Sdn Bhd* [1995] 2 CLJ 118 and *Siang Galau v Ang Wok Hiong* [1994] 1 MLJ 42 diikut.]

Notes

For a case where the notice of appeal was served out of time, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 285.

For cases on extension of time, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3570–3577.

Cases referred to

Carmel Exporters (Sales) Ltd v Sea-Land Services Inc [1981] 1 All ER 984

Mohd Afsar Yunus v Handel Utama Sdn Bhd [1995] 2 CLJ 118

Siang Galau v Ang Wak Hiong [1994] 1 MLJ 42

Legislation referred to

Rules of the High Court 1980 O 2, O 3 r 5(1), O 55 r 2(1), (2)

Subordinate Courts Rules 1980 O 2, O 49 rr 2(6), 3A(3), (4)

Raymond Szetu (*Chan Wai Ling* with him) (*Nicholas Fung Tokuzip & Co*) for the appellant/respondent.

Sugumar Balakrishnan (*Sugumar & Co*) for the respondent/applicant.

Cur Adv Vult

Tee Ah Sing JC: At the commencement of the hearing of this appeal against the decision of the learned magistrate whereby she ordered the appellant/respondent to pay maintenance of RM3,000 per month, the learned counsel for the respondent/applicant raised the following preliminary objections.

The learned counsel for the respondent/applicant submitted that the notice of appeal was served upon the respondent/applicant out of time by five days in non-compliance with O 49 r 2(6) of the Subordinate Courts Rules 1980 ('the SCR'). Secondly he submitted that the memorandum of appeal was filed one day after the expiry period and served 29 days after the expiry date in non-compliance with O 55 r 2(1) and (2) of the Rules of the High Court 1980 ('the RHC'). Thirdly he submitted that the record of appeal was not filed within six weeks as provided for under O 49 r 3A(3) and (4) of the SCR. It was thus submitted that the appeal should be dismissed.

The learned counsel for the appellant/respondent conceded that they were four days late in serving the notice of appeal on the respondent/applicant. He submitted that they filed the memorandum of appeal in time. He however conceded that they were late in serving the memorandum of appeal on the respondent by one day. He then submitted that they had filed and served the record of appeal within the six weeks period. A B

He submitted that the delay of four days in serving the notice of appeal and the delay of one day in serving the memorandum of appeal on the respondent was an irregularity which was curable under O 2 of the RHC and O 2 of the SCR. He went on to contend that under O 3 r 5(1) of the RHC, the court is empowered on such terms as it thinks just by order to extend or abridge the period within which a person is required by these rules to do any act in any proceeding. C

He submitted that the delay has not prejudiced the respondent/applicant and if it has, such prejudice may be remedied by an award of costs. In support he cited the case of *Carmel Exporters (Sales) Ltd v Sea-Land Services Inc* [1981] 1 All ER 984. He urged the court to dismiss the preliminary objections and abridge the time of service of the notice of appeal and the memorandum of appeal on the respondent/applicant. D

In reply the learned counsel for the respondent/applicant submitted that the court cannot on its own volition extend or abridge time under O 3 r 5(1) of the RHC without a proper application. In support he cited the case of *Mohd Afsar Yunus v Handel Utama Sdn Bhd* [1995] 2 CLJ 118. As to the issue whether there is prejudice and whether it could be remedied by an award of costs, this does not arise since where an appeal has not complied with the procedural rules then there is no appeal properly brought before the court. E

The undisputed facts, so far as are relevant to the determination of the court are as follows: F

(a) Both the appellant/respondent and the respondent/applicant were represented in the magistrates' court;

(b) The decision or judgment appealed from was given on 7 July 1995; G

(c) On 12 July 1995 the appellant/respondent through his counsel filed the notice of appeal;

(d) The notice of appeal was served on the respondent/applicant's counsel on 25 July 1995;

(e) On 14 December 1995 the appellant/respondent was through his counsel served with a notice notifying that the notes of evidence and the grounds of judgment were ready (hereinafter referred to as 'Form 141'); H

(f) The memorandum of appeal dated 28 December 1995 was filed with the magistrates' court registry on the same date it was dated, ie, 28 December 1995; I

(g) The registrar of the magistrates' court by a letter dated 30 December 1995 forwarded the notes of proceedings, four copies of the notice of

appeal and three copies of the memorandum of appeal to the deputy registrar of the High Court at Kota Kinabalu, which was received on 2 January 1996;

(h) The record of appeal which included the memorandum of appeal was filed in the High Court registry on 25 January 1996 and a copy thereof was served on the respondent/applicant through her counsel on 25 January 1996.

In the case of *Siang Galau v Ang Wak Hiong* [1994] 1 MLJ 42 his Lordship Chong Siew Fai J (as he then was) at pp 44 to 46 said as follows:

> It must first be recognized that the filing and service of a memorandum of appeal constitute an essential part of the appeal procedure. Order 55 r 4(3) of the RHC provides that if the memorandum is not filed or served within the prescribed time and no sufficient ground is shown for the delay, the appeal may be dismissed. Also, r 3 of the said O 55 makes the filing and the service of a notice of cross-appeal dependent upon the service of the memorandum of appeal. Besides, a memorandum of appeal drawn up according to the provisions of the RHC would give appropriate notice to the respondent of the grounds of appeal to meet (see *Elayachee v Woo Siu Tip* [1991] 3 MLJ 108 at p 110D-H col 1; and Form 113A).
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> Secondly, it must be noted that the memorandum of appeal does not form part of the appeal record required to be filed and served. Order 49 r 3A(1) of the Subordinate Courts Rules 1980 ('the SCR') provides, inter alia, that the appeal record shall contain copies of:
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> (a) the relevant pleadings;
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> (b) the notes of evidence;
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> (c) the grounds of judgment ... ;
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> (d) the decisions;
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> (e) the notice of appeal;
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> (f) all such documentary exhibits and other documents ... relevant for the ... appeal.
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> See also the similar provisions in r 3(1) of the said O 49 that applies to an unrepresented appellant or appellant appealing as a poor person.
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> Since a memorandum of appeal does not form part of the appeal record but is essential to an appeal, when has it to be filed and served? While not disputing that Form 141 was served on his firm on 7 May 1991 and that the memorandum of appeal dated 31 May 1991 in the instant case under appeal was filed and served on 31 May 1991, ie more than 14 days but less than six weeks after service of Form 141, counsel for the appellant/defendant submitted that the filing and service was within the permitted time, relying on *Kuching Pharmacy Sdn Bhd v JL Morison Son & Jones (M) Sdn Bhd* [1990] 2 MLJ 170 and *Shafie bin Ahmad v Hajjah Fatimah bte Ahmad & Ors* [1991] 3 CLJ 2217.
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> With respect, I find myself unable to agree with the contention.
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> For reasons given below, I prefer the *Elayachee v Woo Siu Tip* [1991] 3 MLJ 108 line of decisions to that of *Kuching Pharmacy Sdn Bhd v JL Morison Son & Jones (M) Sdn Bhd* [1990] 2 MLJ 170 and the others. Order 55 r 2 of the RHC provides:

'(1) The appellant shall, within fourteen days from the date of service on him of the notice in Form 141 under Order 49 rule 2 sub-rule (4) or rule 3 sub-rule (2) of the Subordinate Courts Rules 1980 (as the case may be) file in the High Court in duplicate a memorandum of appeal in Form 113A.

(2) The appellant shall within the like period serve each respondent with a copy of such memorandum and a copy of the appeal record.'

Thus, O 55 r 2(1) and (2) quoted above require an appellant to file and serve the memorandum of appeal within 14 days from the service of Form 141 under O 49 r 2(4) or O 49 r 3(2) of the SCR.

Now, although O 49 r 3 of the SCR applies to appellants who are not represented by advocates or who appeal as poor persons, O 49 r 2(4) is a general provision. It reads: 'As soon as the certified copy is ready, the court shall notify the appellant in Form 141.'

The insertion of the said O 49 r 2(4) into O 55 r 2(4) of the RHC by PU(A) 462/90 clearly covers, in my opinion, all appellants other than those unrepresented by advocates or are poor persons. Thus, it applies to an appellant who is represented by an advocate. Now, reading O 55 r 2(1) and (2) of the RHC in conjunction with that of O 49 r 2(4) of the SCR, it appears clear that the memorandum of appeal must be filed and a copy thereof served on the respondent/plaintiff within 14 days after service of Form 141 on the Appellant who is represented.

For the above reasons, I hold that the memorandum of appeal herein dated 31 May 1991 was filed and served out of time, ie after the expiration of 14 days of service of Form 141 on the appellant through his advocate. The preliminary point, therefore, succeeds. No extension of time was applied for and obtained for the late filing and service. The appeal, therefore, must and is hereby dismissed with costs to the respondent/plaintiff.

It is clear that the notice of appeal was served on the respondent/applicant through her counsel on 25 July 1995 which is five days late computed from 20 July 1995. This is in contravention of O 49 r 2(6) of the SCR.

Under O 49 r 3A(3) of the SCR the appeal record must be filed by the appellant/respondent within six weeks of the service upon him of Form 141. Form 141 was served on the appellant/respondent on 14 December 1995. Therefore the six weeks ends on 25 January 1996. In the present case the record of appeal was filed on 25 January 1996 and a copy thereof was served on the respondent/applicant through her counsel on 25 January 1996 which was within the time provided for under O 49 r 3A(3) of the SCR.

The memorandum of appeal dated 28 December 1995 was filed with the magistrate's court registry on 28 December 1995 and not in the High Court registry. The memorandum of appeal dated 28 December 1995 was received from the magistrates' court on 2 January 1996.

Since the appellant/respondent was served with Form 141 on 14 December 1995, the 14 days expires on 28 December 1995 and as the memorandum of appeal was only received by the High Court registry on 2 January 1996 the memorandum of appeal was filed five days late.

A The record of appeal which contained the memorandum of appeal was served on the respondent/applicant through her counsel on 25 January 1996. Under O 55 r 2(1) and (2) of the RHC the appellant/respondent must serve the memorandum of appeal within 14 days from the date of service on him of the notice in Form 141.

B Therefore the memorandum of appeal was served on the respondent/applicant through her counsel 28 days late computed from 28 December 1995.

In this appeal the appellant/respondent was five days out of time when he served the notice of appeal on the respondent/applicant. The C appellant/respondent was five days out of time when he filed the memorandum of appeal in the High Court registry and 28 days out of time when he served the memorandum of appeal on the respondent/applicant through her counsel.

He has not made an application supported by affidavit giving reasons why he had served the notice of appeal five days late and why he filed and D served the memorandum of appeal out of time. What the appellant/respondent's counsel should have done is to apply to the High Court for an extension of time by an application supported by affidavit (see *Mohd Afsar Yunus v Handal Utama Sdn Bhd* [1995] 2 CLJ 118 at p 127 and *Siang Galau v Ang Wok Hiong* [1994] 1 MLJ 42).

E Order 55 r 4(3) of the RHC states that where a memorandum of appeal is not filed or is not served within the prescribed time and no sufficient ground is shown for the delay, the appeal must be dismissed.

For the reasons stated I dismissed the appeal with costs.

Preliminary objections allowed and appeal dismissed.

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Reported by Pearl Wee

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